

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

VICTOR A. TAVARES,	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 19-419WES
	:	
DIRECTOR COYNE-FAGUE;	:	
DEPUTY DIRECTOR KETTLE;	:	
GRIEVANCE COORDINATOR	:	
GALLIGHER; WARDEN ACETO;	:	
CAPTAIN HAIBON,	:	
Defendants.	:	

**REPORT AND RECOMMENDATION**

Patricia A. Sullivan, United States Magistrate Judge.

On August 5, 2019, Plaintiff Victor A. Tavares, a prisoner at the Adult Correctional Institutions (“ACI”), filed a *pro se* complaint pursuant to 42 U.S.C. § 1983 complaining about the length of his state-imposed sentence. He included a motion for leave to proceed *in forma pauperis* (“IFP”), which was referred to me for screening. ECF Nos. 1, 2. While I found that his IFP application satisfied the requirements of 28 U.S.C. § 1915(a)(1), I did not grant the IFP motion. Instead, in a report and recommendation dated August 22, 2019, I recommended that Plaintiff’s complaint be summarily dismissed for failure to state a claim because “it failed to state a viable habeas corpus claim due to its failure to allege exhaustion of applicable state remedies, as well as because, to the extent that it claims money damages, it is Heck-barred.” ECF No. 3 at 8. I further found the complaint to be “patently meritless and beyond all hope of redemption” because Plaintiff had “clothed in the trappings of § 1983 a claim for habeas corpus relief that is not facially plausible,” and it was Plaintiff’s second time asserting the same claim. Id. at 7, 9. Plaintiff’s objection to the report and recommendation (ECF No. 4) was rejected by

the District Court, which adopted it by text order on October 22, 2019. The complaint was dismissed without leave to amend. See Text Order of Oct. 22, 2019.

On November 18, 2019, Plaintiff filed a two-sentence, handwritten motion for leave to appeal IFP. ECF No. 6. The entirety of the grounds for the IFP motion is as follows: “Plaintiff moves for leave to proceed in forma pauperis due to the fact that the order entered has no memorandum and order signed by the Justice nor is there an entry of a final, valid judgment.” Id. This appellate IFP motion has been referred to me for determination. Because I find that it should be denied, I am addressing it by report and recommendation. Keselica v. Wall, No. CA 07-224 ML, 2007 WL 2126518, at \*1 (D.R.I. July 23, 2007) (denial of IFP motion is equivalent of dismissal).

Because his prior IFP motion was not granted, Fed. R. App. P. 24(a)(3), procedurally, Plaintiff’s IFP motion is controlled by Fed. R. App. P. 24(a), which requires that he must provide the Court with an affidavit that (i) demonstrates the party’s inability to pay in the detail prescribed by Form 4 of the Appendix of Forms; (ii) claims an entitlement to redress; and (iii) states the issues that the party intends to present on appeal. Plaintiff did not comply with any these requirements. He did not file a completed affidavit based on Form 4 and did not include a copy of his prisoner trust fund account statement; therefore, the Court cannot ascertain whether he remains financially qualified for IFP status on appeal.<sup>1</sup> Further, he has stated nothing regarding his entitlement to redress. And, so far, what Plaintiff has provided regarding the issues he intends to present on appeal appears to be inadequate in that he complains only that the District Court adopted my report and recommendation by text order instead of by memorandum

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<sup>1</sup> While the Court could guess based on his August 5, 2019, IFP submission and his continued incarceration that Plaintiff very likely remains qualified for IFP status, he has not complied with the procedures set forth in Fed. R. App. P. 24(a). Therefore, I cannot find him entitled to proceed IFP.

and order and did not enter a separate final judgment. However, he presents no legal principle that would bar the Court from proceeding by text order, which is a common practice. E.g., Brown v. Ricci, Civil Action No. 11-11154-RGS, 2012 WL 88068, at \*1 (D. Mass. Jan. 10, 2012). Further, he articulates no reason why a separate judgment needed to enter given that dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) amounts to a “judgment on the merits.” Federated Dep’t. Stores, Inc. v. Moitie, 452 U.S. 394, 399 (1981); Airframe Sys., Inc. v. Raytheon Co., 601 F.3d 9, 14 (1st Cir. 2010) (“dismissal of . . . suit for failure to state a claim was plainly a final judgment on the merits”). Therefore, these do not appear to amount to “issues that the party intends to present on appeal.”

Based on the foregoing, I find that Plaintiff’s appellate IFP motion is procedurally insufficient. In reliance on these deficiencies, I recommend that the IFP motion be denied subject to refileing it with appropriate documentation. Such documentation would have to include a completed Form 4, with a current copy of the prison trust account, and a statement of the claimed entitlement to redress, as well as the issues to be presented on appeal.

Plaintiff’s IFP motion should also be denied because of the lack of merit of the underlying claim. Section 1915 mandates that “[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.” 28 U.S.C. § 1915(a)(3). For the reasons set forth in the report and recommendation (ECF No. 3) adopted on October 22, 2019, I now recommend that the Court certify that this appeal is not taken in good faith. Lyons v. Wall, No. CA 04-380-T, 2007 WL 2067661, at \*1 (D.R.I. July 13, 2007); see, e.g., Hale v. Dearie, 19-CV-1257(AMD)(ST), 2019 WL 1517087, at \*3 (E.D.N.Y. Apr. 8, 2019), appeal dismissed, (Aug. 14, 2019) (court certifies that appeal of dismissal of § 1983 action challenging incarceration and seeking damages not taken in good faith because any attempt to amend such a

complaint would be futile); Jackson v. Tucker, Case No. 2:18-cv-1736, 2019 WL 2004022, at \*1 (S.D. Ohio May 7, 2019) (court certifies appeal would not be in good faith because plaintiff seeks invalidation of state-court criminal proceedings and sentence; complaint dismissed as Heck-barred); Mariscal v. Skolnik, No. 2:09-CV-02334-KJD, 2012 WL 2522650, at \*4 (D. Nev. June 29, 2012) (court certifies that appeal would not be in good faith after plaintiff was plainly and consistently told that he must seek post-conviction relief and not file § 1983 action). If this recommendation is adopted, I further recommend that Plaintiff be denied IFP status based on the Court's certification, even if he overcomes the procedural deficits identified above. See Lyons, 2007 WL 2067661, at \*1.

In conclusion, based on Plaintiff's procedural failure to comply with the requirements of Fed. R. App. P. 24(a), as well as (to the extent that the Court adopts my recommendation and certifies that an appeal would not be taken in good faith), based on the lack-of-good-faith certification, I recommend that Plaintiff's motion (ECF No. 6) to proceed IFP on appeal be denied. Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days of its receipt. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan  
PATRICIA A. SULLIVAN  
United States Magistrate Judge  
December 16, 2019